Abdullah bin Jacomah v Public Prosecutor

HIGH COURT (KUALA LUMPUR) — CRIMINAL APPEAL NO 42A–1 OF 2002
AUGUSTINE PAUL J
16 MAY 2002

Criminal Procedure *— Defence — Witnesses — Prosecution failed to call witnesses to rebut defence — Whether failure by sessions court judge to consider defence a non-direction*

Criminal Procedure *— Trial — Statement from the dock — Accused person's application to give sworn evidence after he had completed making his statement from the dock disallowed — Whether application of the accused person in conflict with s 173(j)(iii) of the Criminal Procedure Code — Whether there was a miscarriage of justice — Criminal Procedure Code s 173(j)(iii)*

Criminal Procedure *— Trial — Statement from dock — Accused person denied right to make a proper statement from the dock with the assistance of counsel — Whether accused person properly heard — Whether this amounted to a breach of natural justice*

The accused was a sergeant attached to the Dang Wangi Police Station. He officiated as an investigation officer. He was charged with an offence of corruption in the Sessions Court at Kuala Lumpur. The accused claimed trial to the charge. At the close of the case for the prosecution, the learned sessions court judge found that a prima facie case had been made out and he called upon the accused to enter his defence. When the three alternatives were explained to the accused he elected to make a statement from the dock. His counsel was not allowed to assist him in making the statement. At the end of the statement, the accused made an application to court to be allowed to give evidence on oath. This application was disallowed by the learned sessions court judge. The accused called two witnesses for his defence. The evidence from the accused's two witnesses was dismissed by the learned sessions court judge. The learned sessions court judge found the accused guilty and upon conviction sentenced him to 18 months' imprisonment and a fine of RM10,000 in default six months' imprisonment. The accused appealed against the conviction and sentence.

Held, allowing the appeal:

(1) The failure by the prosecution to call evidence to rebut the defence raised lent additional credit to it. The significance of the evidence of the defence was thus discernible. It was capable of creating a doubt as to whether the trap money was given to the accused. In the circumstances, the defence advanced could not be rejected even though it may not have been believable. The failure by the learned sessions court judge to have considered the defence was therefore a non-direction, which resulted in a grave miscarriage of justice (see p 337B–D).

(2) The right to legal representation is expressly conferred by art 5(3) of the Federal Constitution, which provides that a person who has been arrested shall be allowed to consult and be defended by a legal practitioner of his choice. This is reinforced by s 255 of the Criminal Procedure Code ('the Code'). Such a fundamental right cannot be whittled down or restricted unless there is express statutory provision to that effect of which there is none in the case of the manner of making a statement from the dock. The right to be defended means that not only must counsel be heard but that there must also be an opportunity of being effectively heard (see pp 337H, 338A); *Vinayak Laxman v Emperor* AIR 1928 Bom 557 followed.

(3) The right will be meaningless if the legal representative is precluded from full participation. Counsel can be fully and effectively heard only if he has complete control of the defence. This must include the right to adduce evidence which is relevant, necessary and admissible when the accused is required to testify. It is absolutely necessary for counsel to have such a right as he is the person who is ultimately responsible for the conduct of the defence. As such he cannot be denied the right to participate fully in the proceeding in any manner chosen by the accused to advance his defence. Thus, a denial of the right to make a proper statement from the dock with the assistance of counsel will result in the accused not being heard properly and will thereby amount to a breach of natural justice unless there is statutory power to do so of which there is none (see pp 338A–C, G–H).

(4) The accused's application to give sworn evidence after he had completed making his statement from the dock ought to have been allowed. At the time of making the application no other defence witnesses had been called yet. Thus, the application made by the accused would not in any way conflict with s 173(j)(iii) of the Code, which provides that the evidence of the accused shall be taken before that of other witnesses for the defence. The application made by the accused, though of undoubted inconvenience to the court, was consistent with the rule that every possible opportunity should be afforded to an accused to defend himself. The result of these breaches was that the accused had been denied the right of advancing his defence in the best possible way, which amounted to a miscarriage of justice (see pp 338I–339B).

[Bahasa Malaysia summary

Tertuduh adalah seorang sarjan yang berkhidmat dengan Balai Polis Dang Wangi. Beliau memegang jawatan sebagai seorang pegawai siasatan. Beliau dipertuduh dengan kesalahan sogokan di Mahkamah Sesyen Kuala Lumpur. Tertuduh menuntut perbicaraan terhadap pertuduhan itu. Di penutup kes untuk pihak pendakwa, hakim mahkamah sesyen yang arif mendapati bahawa satu kes prima facie

telah dibuktikan dan beliau memanggil tertuduh memasukkan pembelaannya. Apabila tiga alternatif dijelaskan kepada tertuduh, beliau memilih untuk membuat pernyataan dari kandang. Peguam yang mewakilinya tidak dibenarkan membantu membuat pernyataan. Di penghujung pernyataan, tertuduh membuat satu permohonan kepada mahkamah supaya dibenarkan memberi keterangan bersumpah. Permohonan ini ditolak oleh hakim mahkamah sesyen yang arif. Tertuduh telah memanggil dua saksi bagi pembelaan beliau. Keterangan dari saksi-saksi tertuduh telah ditolak oleh hakim mahkamah sesyen yang arif. Hakim mahkamah sesyen yang arif mendapati tertuduh bersalah dan atas sabitan menjatuhkan hukuman penjara selama 18 bulan ke atasnya dan denda sebanyak RM10,000 ingkar penjara selama enam bulan. Tertuduh merayu terhadap sabitan dan hukuman.

Diputuskan, membenarkan rayuan tersebut:

(1) Kegagalan pihak pendakwa untuk memanggil keterangan bagi menyangkal pembelaan yang dibangkitkan memberikan tambahan ke atas kebolehpercayaan pembelaan tersebut. Kepentingan keterangan oleh pihak pembelaan dapat dilihat. Ia berupaya mewujudkan keraguan sama ada wang perangkap telah diberikan kepada tertuduh. Dalam keadaan sedemikian, pembelaan yang dikemukakan tidak boleh ditolak walaupun ia mungkin tidak boleh dipercayai. Dengan itu, kegagalan hakim mahkamah sesyen yang arif untuk menimbang pembelaan tersebut adalah satu ketidakarahan yang telah mengakibatkan salah laksana keadilan yang serius (lihat ms 337B–D).

(2) Hak mendapat perwakilan undang-undang telah pun dikurniakan secara nyata oleh perkara 5(3) Perlembagaan Persekutuan, yang memperuntukkan bahawa seseorang yang telah ditangkap hendaklah dibenar meminta nasihat dan dibela oleh pengamal undang-undang pilihannya. Ini diperkukuhkan lagi oleh s 255 Kanun Acara Jenayah ('Kanun tersebut'). Hak asas ini tidak boleh dikurangkan atau dihadkan melainkan adanya peruntukan berkanun yang nyata mengatakan sedemikian yang mana tidak terdapat dalam keadaan di mana pernyataan dibuat dari kandang orang salah. Hak untuk dibela bermaksud bahawa peguam bukan sahaja mesti didengar tetapi juga terdapatnya peluang untuk didengar secara berkesan (lihat ms 337H, 338A); *Vinayak Laxman v Emperor* AIR 1928 Bom 557 diikut.

(3) Hak tersebut akan menjadi tidak bermakna sekiranya wakil undang-undang dikecualikan daripada penyertaan sepenuh. Peguam hanya boleh didengar dengan sepenuhnya dan secara berkesan andainya beliau diberikan kawalan penuh ke atas pembelaan. Ini mestilah termasuk hak untuk mengemukakan keterangan yang relevan, perlu dan boleh diterima apabila tertuduh dikehendaki memberi keterangan. Adalah amat perlu

untuk peguam diberikan hak sedemikian kerana beliau merupakan pihak yang bertanggungjawab untuk pelaksanaan pembelaan. Oleh yang demikian, beliau tidak boleh dinafikan hak untuk menyertai sepenuhnya prosiding tersebut dalam apa-apa cara pun yang dipilih oleh tertuduh untuk mengutarakan pembelaannya. Justeru itu, penafian hak untuk membuat pernyataan yang wajar dari kandang orang salah dengan bantuan peguam akan mengakibatkan tertuduh tidak didengar dengan sewajarnya dan, oleh itu, akan membawa kepada kemungkiran keadilan asas melainkan adanya kuasa berkanun untuk berbuat demikian yang mana tidak terdapat di sini (lihat ms 338A–C, G–H).

(4) Permohonan tertuduh untuk memberi keterangan bersumpah setelah selesai memberi pernyataan dari kandang orang salah seharusnya dibenarkan. Semasa permohonan dikemukakan, tiada saksi lain pembelaan telah dipanggil. Justeru itu, permohonan yang dibuat oleh tertuduh tidak akan, dalam apa-apa cara pun, bercanggah dengan s 173(j)(iii) Kanun tersebut, yang memperuntukkan bahawa keterangan tertuduh hendaklah diambil sebelum keterangan saksi lain pihak pembelaan. Permohonan yang dibuat oleh tertuduh, biarpun setidak-tidaknya menyebabkan kesulitan kepada mahkamah, adalah selaras dengan rukun bahawa setiap peluang yang ada haruslah diberikan kepada seseorang yang dituduh untuk membela diri. Akibat kemungkiran ini, tertuduh telah dinafikan hak untuk mengemukakan pembelaannya dalam cara sebaik mungkin, yang membawa kepada kegagalan keadilan (lihat ms 338I–339B).]

Notes

For cases on right to counsel, see 5 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 620–627

For cases on witnesses, see 5 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 1475–1482

For cases on statement from dock, see 5 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 4211–4214

Cases referred to

Alcontara a/l Ambross Anthony v Public Prosecutor [1996] 1 MLJ 209 (refd)

Browne v Dunn (1893) 6 R 67 (refd)

Chan Thim v Public Prosecutor [1949] MLJ 72 (refd)

Chang Lee Swee v Public Prosecutor [1985] 1 MLJ 75 (refd)

GFL Ewin v Public Prosecutor [1949] MLJ 279 (refd)

Haryadi bin Dadeh v Public Prosecutor [2000] 4 MLJ 71 (refd)

J Connell v The King AIR 1947 PC 186 (refd)

Karthigasu v Public Prosecutor [1946] MLJ 124 (refd)

Lee Kong Yin v Public Prosecutor [1970] 2 MLJ 205 (refd)

Mohamed Kunjo v Public Prosecutor [1978] 1 MLJ 51 (refd)

Mohammad Radhi bin Yaakob v Public Prosecutor [1991] 3 MLJ 169 (refd)
Mohammed Shariff v Public Prosecutor [1964] MLJ 64 (refd)
Neville v Public Prosecutor [1992] 1 SLR 153 (refd)
Noliana bte Sulaiman v Public Prosecutor [2000] 4 MLJ 752 (refd)
Ong Ah Too v R [1955] MLJ 247 (refd)
PP v Chia Leong Foo [2000] 6 MLJ 705 (refd)
Pett v Greyhound Racing Association Ltd (No 1) [1969] 1 QB 125 (refd)
R v Bashir (1983) 77 Cr App R 59 (refd)
R v Porritt (1961) 45 Cr App R 348 (refd)
R v Killick [1980] 24 SASR 137 (refd)
Vinayak Laxman v Emperor AIR 1928 Bom 557 (folld)
Yeoh Bah Kow v Public Prosecutor [1961] MLJ 6 (refd)

Legislation referred to

Criminal Procedure Code ss 173(k), 255

Appeal from: Arrest Case No 61–2–2000 (Sessions Court, Kuala Lumpur)

Ghazali bin Nik Taib (*Noor Jihan Ghazali & Co*) for the appellant.
Asliza Ali (Timbalan Pendakwa Raya) for the prosecution.

Augustine Paul J: In 1999, the accused was a sergeant attached to the Dang Wangi Police Station. He officiated as an investigation officer. On 20 March 2000 he was charged with an offence of corruption in the Sessions Court at Kuala Lumpur. The charge reads as follows:

> Bahawa kamu pada 19 Julai 1999, jam lebih kurang 4.25 petang di hadapan pintu utama Balai Polis Dang Wangi, Kuala Lumpur, di dalam Wilayah Persekutuan, sebagai seorang agen kerajaan Malaysia, iaitu sebagai seorang Sarjan Polis, Polis DiRaja Malaysia, telah menyetuju-terima daripada seorang bernama Mat Jusuh bin Mat Husin satu suapan untuk diri kamu, iaitu wang tunai RM200 (Ringgit Malaysia dua ratus sahaja) sebagai satu dorongan untuk tidak melakukan satu perbuatan berhubung hal ehwal prinsipal kamu, iaitu bagi menyelesaikan kes dan tidak mempertuduh di mahkamah terhadap seorang bernama Mohd Noor Khairul Hisham bin Mat Husin, iaitu adik kepada Mat Jusuh bin Mat Husin tersebut yang disiasat oleh kamu dan dengan ini kamu telah melakukan suatu kesalahan di bawah s 11(a) Akta Pencegahan Rasuah 1997 (Undang-Undang Malaysia Akta 575) yang boleh dihukum di bawah s 16 Akta yang sama.

The accused claimed trial to the charge. The prosecution called a total of 13 witnesses in support of its case, two of whom are Mat Jusoh bin Mat Husin ('PW2') and Mohd Noor Khairul Hisham bin Mat Husin ('PW5'). They are brothers. On 4 July 1999, PW2 received a telephone call from the accused informing him that PW5 had been detained in connection with a theft case. PW2 was asked to go to the police station. He met the accused there. As he said:

> Saya cuba buat rayuan dan minta pertolongan. Tertuduh kata boleh tolong tetapi 'takkan tak ada apa-apa'. Saya faham apa yang dimaksudnya. Saya

A tanya dia 'apa-apa macam mana Encik'. 'Yalah saya hendak bincang dengan pegawai dan anak-anak buah'. Saya faham ia hendak imbuhan kemungkinan duit. Saya kata saya tidak bawa duit. Tertuduh kata 'habis nak tolong macam mana'. Saya katakan saya ada duit RM20–RM30 sahaja. Tertuduh suruh balik dan ia bagi nombor telefon biliknya untuk menghubungi beliau keesokan hari.

B On the following day, PW2 received a telephone call from the accused asking him to go to the Dang Wangi Police Station. On arrival there, PW2 met PW5 and the accused. The accused told PW2 that PW5 can be bailed out and asked him to take PW5 to the hospital for examination. PW2 was also given a bail bond (exh P2). At about 4pm the accused telephoned PW2 C to inquire about the condition of PW5. On 16 July 1999, at about 8pm PW2 received another telephone call from the accused. As PW2 said:

> Tertuduh dengan suara nada yang agak tinggi tanya saya, saya ingatkah tarikh saya perlu bawa adik saya ke Balai. Saya tanya 'macam mana kes adik saya'. Tertuduh kata 'kamu tak ada apa-apa pun'. Saya tanya 'ada apa-apa macam mana'. Ia kata 'apa-apa untuk menyelesaikan kes ini'. Saya tanya 'Sjn minta D berapa'. Ia kata 'terpulanglah dan ia hendak bagi kepada anak-anak buah lagi'. Saya tanya 'RM100 cukup?'. Tertuduh dengan nada tinggi kata 'gandakan'. Saya kata 'yalah'. Tertuduh ada kata membawa adik saya pada 17 Julai 1999.

On 19 July 1999, PW2 made a report of what had transpired to the Anti-Corruption Agency ('ACA') (exh P3). PW2 was asked to make a telephone E call to the accused. He did so at 2pm. The conversation between the accused and PW2 was taped by Norhardy bin Mat Noh ('PW7'), an ACA officer. He tendered the recorded tape in evidence (exhs P7 and P7A). Wahab bin Wahid ('PW13'), also an ACA officer, made a transcript of the recorded conversation (exh P16). The material parts of exh P16 read as follows:

F B: Ahh, tadi talipon sekejap lepas itu teringat berapa sarjan nak duit lak?
C: Ahh?
B: Berapa Sarjan nak?
C: Serupalah.
B: Ahh.
G C: Yang kamu datang dulu.
B: Sebab ... sebab dia pergi ambil duit dia tak cukup tu.
C: Ahh (Tak jelas).
B: Berapa sarjan hendak?
H C: Dua ratus.
B: Dua ratus?
C: Dua ... dua ... dua.
B: Ahh.
C: Ahh.
I B: Ahh. Saya pergi ... pukul 3.30 sampai kat balai polislah.
C: Ahh.
B: Macam ... macam kalau saya bagi sarjan nak ni boleh settle ke keslah?

C: Boleh selesailah.

B: Boleh selesailah.

C: Ahh.

PW2 was then given four RM50 notes (exhs P5A–D) by PW13, the investigation officer in this case. A list bearing the serial numbers of the four notes was prepared (exh P4). It was signed by PW2 and PW13. PW2 and PW5 then went to the Dang Wangi Police Station together with an ACA officer. They parked their car behind the police station. The ACA officer sat in a shop. Abdul Rahman bin Abu Bakar ('PW11'), Salatukhamswan bin Abdul Latif ('PW9') and Mohd Nizam bin Isa ('PW6'), all of them ACA officers, also went to the scene and positioned themselves near the police station.

On arrival at the police station, PW5 went inside alone to hand over exh P2 to the accused. PW2 who had waited outside was then called in by PW5 on the instructions of the accused. The three of them then went to a shop nearby to have a drink. As PW2 said:

> Kami bertiga duduk semeja dan saya tanya tertuduh 'macam mana kes adik saya'. Tertuduh kata kes adik saya tidak akan didakwa, dah selesai. Tertuduh kata duit RM200 yang diminta bukan untuknya sahaja tetapi diberi kepada anak-anak buahnya. Kami berbual kosong dan minum. Setelah selesai minum kami bertiga menuju ke balai polis. Di dalam perjalanan, tertuduh memberi surat jamin dan menyerahkan duit diletak dalam lipatan surat jamin. Saya ambil surat dan tertuduh jalan terus. Saya berhenti dan masukkan duit RM200 dalam lipatan diperhatikan oleh adik saya. Saya berjalan menuju ke balai polis dan sampai di pintu besar saya beri salam dan surat jamin. Kami bersalam dan balik. Dalam taklimat dengan pegawai BPR, saya dan adik saya telah diberitahu untuk memberi isyarat sekiranya tertuduh minta duit tersebut. Saya dan adik saya keluarkan baju dari seluar sebagai isyarat iaitu selepas 2–3 langkah setelah memberi duit. Dua orang pegawai BPR telah mengekori saya dan adik saya dan melihat isyarat saya dan saya sempat beritahu beliau bahawa tertuduh masuk ke bilik ikut pintu besar sebelah kanan. Nama pegawai BPR saya sudah lupa.

PW5 said in his evidence that when he went into the police station, the accused, after asking him about the money, took exh P2 from him and asked him to call PW2. PW5 did so. The three of them went to a shop to have a drink. PW5 then said:

> Selepas minum, saya dan abang saya berjalan untuk pergi ke balai. Sambil jalan OKT mengatakan kepada abang saya hendaklah letakkan duit dalam surat jamin. Selepas itu abang saya ambil surat jamin dan mengeluarkan dompet dan mengambil duit dan masukkan dalam surat jamin. Selepas itu abang saya menyerah surat jamin kepada OKT di hadapan balai polis. Duit sebanyak RM200 diletakkan dalam surat jamin. Selepas abang saya serah duit, kami dikehendaki keluarkan baju sebagai tanda penyerahan wang.

P11, while stationed in front of the police station, saw PW5 going inside. Later he noticed PW2, PW5 and the accused going to the shop. He then noticed PW2 and PW5 giving the pre-arranged signal. He followed them into the police station with PW6, Shahadan bin Mohd Yatim ('PW12'),

Kasim Osman and Yusof, all of whom are ACA officers. They entered a room in the police station. PW11 saw the accused seated on a chair and talking with a male Chinese. PW11 asked the accused to stand up and conducted a body search on him. As PW11 said:

> Setelah pemeriksaan badan sasaran didapati tiada wang diperolehi, saya kemudian dengan Penguasa Kanan Yusof Din keluar dari bilik berkenaan meninggalkan sasaran bersama Penguasa Kasim dan Pen Penguasa Shahadan dan Penyiasat En Mohd Nidzam. Lebih kurang lima minit kemudian, saya masuk semula dalam bilik dan telah dimaklumkan oleh En Kasim Osman bahawa wang perangkap telah diperolehi. Saya kemudian mengeluarkan notis tangkapan kepada OKT... Saya keluar dari pejabat untuk berbincang di mana perginya wang perangkap.

As PW11 said in his cross-examination:

> Saya dan En Yusof keluar dari pejabat OKT. Saya maklumkan wang tidak ada pada OKT dan apa tindakan seterusnya. Kami memutuskan supaya membuat pemeriksaan sepenuhnya dalam bilik. Orang Cina masih ada di meja OKT. Anggota polis juga ada dalam bilik. Masa meja OKT diperiksa, saya tidak ada dalam bilik.

PW9 said that he went to the police station together with PW6. He waited near the police station. He noticed PW2, PW5 and the accused going for a drink. When they were returning to the police station, he and PW6 were instructed to follow them. They were joined by PW11 and the three of them went into the police station. PW9 then said:

> Saya terima arahan daripada Penguasa Kasim untuk menggeledah meja yang tertuduh duduk. Dalam laci di sebelah kiri laci nombor 2, saya jumpa surat jamin polis bersama wang RM200. Saya tunjukkan kepada tertuduh dan semak no siri wang dan saya dapat nombor adalah sama dengan wang perangkap. Saya kemudian periksa dompet tertuduh dan dapati wang kepunyaan tertuduh.

In his cross-examination, PW9 said:

> Selepas masuk saya terus ke meja tertuduh. Saya tahu itu meja tertuduh kerana dia duduk di meja tersebut. Sekiranya dia duduk di meja lain saya akan ke meja tersebut. Arahan terus ke meja tertuduh tiada. Dua pegawai BPR berurusan dengan tertuduh dan saya diarah pergi ke meja.

At the close of the case for the prosecution, the learned sessions court judge found that a prima facie case had been made out and he called upon the accused to enter his defence. When the three alternatives were explained to the accused, he elected to make a statement from the dock. His counsel was not allowed to assist him in making the statement. At the end of the statement, the accused made an application to court to be allowed to give evidence on oath. This application was disallowed by the learned sessions court judge. The accused then called two other witnesses who had been offered to the defence at the close of the prosecution case.

In his statement from the dock, the accused said that he telephoned PW2 to inform him of the arrest of PW5. On 19 July 1999, PW2 and PW5 met him at the Dang Wangi Police Station. PW2 gave him exh P2. When

he went into his room, an ACA officer arrived and searched him. From the drawer, exh P2 and the money were recovered. Mohamad Aziz bin Kasim ('DW2'), a police sergeant, was the first witness called by the accused. He was in the office at the time of the arrest of the accused. At that time, the accused was talking to two persons who were seated. Earlier, he had seen the accused coming in with a white paper. He then said:

> P6L ditunjuk kepada saksi ialah gambar laci meja OKT. Saya pernah duduk di meja ini – laci meja itu ketat untuk buka dan tutup. Sekira laci ini dibuka ia akan berbunyi dan silap-silap akan jatuh. Semasa tutup pasti akan bunyi. Sebelum serbuan, saya tidak dengar laci ini dibuka atau tutup.

In his cross-examination he said that he did not know whether the accused had opened the drawer from the time he came into the office till he was arrested. Jamaludin bin Abd Wahab ('DW3') is also a sergeant working with the accused. He saw the accused coming into the office with a bail bond form which was not folded. In describing the table in photograph exh P6L he said:

> Saya biasa dengan meja ini. Laci meja ini rosak dan senget iaitu buka berbunyi tutup pun berbunyi. Bunyi ketika laci dibuka dan ditutup boleh didengar.
>
> Masa OKT letak kertas jamin saya tak dengar bunyi laci dibuka atau tutup.

When the ACA officers opened the drawer, he heard the sound of it being opened. In his cross-examination, he said that he was sure that the accused did not open any drawer. He did not agree with the suggestion made by the prosecution that prior to the arrest the accused opened the drawer and that he did not know about it.

The learned sessions court judge found the accused guilty and upon conviction sentenced him to 18 months' imprisonment and a fine of RM10,000 in default six months' imprisonment. The accused appealed against the conviction and sentence.

In his grounds of judgment, the learned sessions court judge identified the ingredients that must be proved at the end of its case as follows:

1 tertuduh adalah seorang agen kerajaan, iaitu seorang sarjan Polis DiRaja Malaysia.

2 pada 19 Julai 1999, jam lebih kurang 4.25pm, di hadapan pintu utama Balai Polis Dang Wangi, tertuduh telah menyetuju terima wang suapan RM200 daripada Mat Jusoh bin Mat Husin (SP2).

3 wang RM200 adalah dorongan untuk tidak melakukan satu perbuatan berhubung hal ehwal prinsipal iaitu menyelesaikan dan tidak mempertuduh seorang bernama Mohd Noor Khairul (SP5) bagi satu kes yang disiasatnya.

With regard to proof of the second ingredient he said:

> Ingredien kedua telah dibuktikan melalui SP2. Keterangan SP2 telah disokong oleh keterangan SP5 yang berada bersama SP2 semasa dia serah duit RM200 kepada tertuduh. Keterangan SP2 dan SP5 pula disokong oleh

keterangan pegawai BPR, khususnya SP9, yang telah menjumpai wang perangkap di laci meja di mana tertuduh sedang duduk. Perjumpaan wang perangkap boleh dianggap sebagai sokongan kepada keterangan SP2 dan SP5.

In making his findings on the defence advanced by the accused he said:

> Saksi-saksi yang dipanggil oleh tertuduh iaitu SD2 dan SD3 memberi keterangan bahawa mereka berada bersama tertuduh dalam pejabat semasa serbuan oleh pegawai BPR. Sebelum itu, mereka mengetahui tertuduh telah keluar untuk berjumpa dengan seorang saspek mengenai surat jaminan. Semasa tertuduh masuk balik mereka ada nampak ia hanya memegang satu kertas jaminan. Saksi-saksi ini juga menyatakan mereka tidak mendengar laci meja tertuduh dibuka, apa yang mereka cuba timbulkan ialah tidak mungkin tertuduh ada letak surat jaminan berkenaan dalam laci.

And soon after that he continued:

> Rumusan saya ke atas keterangan tertuduh adalah seperti berikut:
>
> 1 saya dapati keterangan tertuduh adalah selari dengan keterangan SP2 dan SP5 dalam semua aspek kecuali tertuduh tidak sentuh langsung tentang wang RM200. Tertuduh tidak menafikan bahawa dia ada minta atau menerima wang RM200 tersebut;
>
> 2 dengan tidak memberi sebarang penjelasan terhadap wang RM200, tertuduh seolah-olah telah mengakui keterangan yang dikemukakan oleh SP2 dan SP5;
>
> 3 keterangan saksi-saksi pembelaan tidak dapat membantu kes tertuduh kerana mereka cuma nampak tertuduh keluar dan kemudian masuk balik dengan memegang satu kertas. Apakah kandungan kertas itu mereka tidak tahu.
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> Kesimpulan saya ialah tertuduh gagal menimbulkan sebarang keraguan munasabah di atas kes pendakwaan dan juga gagal mengenepikan anggapan yang dia ambil wang itu sebagai dorongan supaya SP5 tidak dituduh.

It will therefore be observed that it is the view of the learned sessions court judge that the second ingredient had been proved by the evidence of PW2 and PW5 to show that the money had been accepted by the accused. He said that this evidence is supported by the finding of the trap money (exhs P5A–D) in the drawer of the accused by PW9. He dismissed the evidence of DW2 and DW3 on the ground that they only saw the accused going out and later returning with a paper, although earlier he had recognized the fact that their evidence was meant to show that the accused could not have left the bail bond in the drawer. In view of the importance ascribed by the learned sessions court judge to the recovery of the trap money from the drawer followed by a rejection of the evidence of the defence witnesses, I consider it necessary to delve into it.

It will be recalled that the learned sessions court judge dismissed the evidence of DW2 and DW3 in the following words:

> Keterangan saksi-saksi pembelaan tidak dapat membantu kes tertuduh kerana mereka cuma nampak tertuduh keluar dan kemudian masuk balik dengan memegang satu kertas. Apakah kandungan kertas itu mereka tidak lihat.

A matter of immediate concern was whether this amounted to a legitimate treatment of the evidence of DW2 and DW3. The law governing a proper appraisal of a defence that has been advanced is well settled. It requires a consideration of all the evidence that have been adduced in support of the defence (see *Chang Lee Swee v Public Prosecutor* [1985] 1 MLJ 75; *Mohamed Shariff v Public Prosecutor* [1964] MLJ 64). A court must consider carefully whether a defence that has been put forward is capable of raising a reasonable doubt in the prosecution case (see *Haryadi bin Dadeh v Public Prosecutor* [2000] 4 MLJ 71). As Mohamed Azmi SCJ said in *Mohamad Radhi bin Yaakob v Public Prosecutor* [1991] 3 MLJ 169 at p 171:

> We are of the view that whenever a criminal case is decided on the basis of the truth of the prosecution's case as against the falsity of the defence story, a trial judge must in accordance with the principle laid down in *Mat v PP* [1963] MLJ 263 go one step further before convicting the accused by giving due consideration as to why the defence story, though could not be believed, did not raise a reasonable doubt in the prosecution case. Thus, even though a judge does not accept or believe the accused's explanation, the accused must not be convicted until the court is satisfied for sufficient reason that such explanation does not cast a reasonable doubt in the prosecution case.

In appropriate cases, a court must consider a defence even if it has not been specifically raised. As Ashworth J said in *R v Porritt* (1961) 45 Cr App R 348 at p 356:

> As has already been said, the issue of manslaughter was not raised at the trial, but there is ample authority for the view that notwithstanding the fact that a particular issue is not raised by the defence, it is incumbent upon the judge trying the case, if the evidence justifies it, to leave such issue to the jury.

Failure to consider or an improper consideration of a possible legal defence is a miscarriage of justice (see *Ong Ah Too v R* [1955] MLJ 247; *Karthigasu v Public Prosecutor* [1946] MLJ 124; *Neville v Public Prosecutor* [1992] 1 SLR 153; *J Connell v The King* AIR 1947 PC 186). In commenting on the effect of a failure to consider a defence that ought to have been dealt with, Watkins LJ said in *R v Bashir* (1983) 77 Cr App R 59 at p 62:

> There can be, and there is, no doubt firstly that a defence can be said to be raised whenever there is evidence, no matter from what source, of a kind which calls upon a judge to conclude that this defence should be left to the jury, and secondly, that his decision as to whether or not that defence should be left to the jury is open to review in this court. If the conclusion here is that he was called upon to leave that defence to the jury and did not, then his failure to do so can amount to such a non-direction as will destroy the conviction.

Similarly in *GFL Ewin v Public Prosecutor* [1949] MLJ 279, it was held that the failure of the trial judge to direct the assessors to consider whether or not the appellant was exercising the right of private defence constituted a non-direction and therefore the conviction must be set aside. It must, however, be noted that where a case is tried by a judge alone it does not follow in every case that his silence as to a possible defence means that he has ignored it (see *Mohamed Kunjo v Public Prosecutor* [1978] 1 MLJ 51; *Neville v Public Prosecutor*[1992] 1 SLR 153).

It is with these principles in mind that I will now consider the testimony of DW2 and DW3. Both of them testified that the drawer from where the trap money was recovered would make some noise when it was opened or closed. Though DW2 said in cross-examination that he did not know whether the accused had opened the drawer, DW3 said that he was sure that the accused had not done so. He then added that he heard the sound when the ACA officer opened the drawer. The learned sessions court judge failed to consider this part of the defence evidence at all. It is very significant. The effect of the defence is to show that at the material time the accused did not open the drawer. If he did not open the drawer he could not have put the trap money there. If he could not have put the trap money in the drawer there would be a doubt as to whether it was in fact given to him by PW2. The cumulative effect of the evidence is that it is capable of raising a doubt in the case for the prosecution. It is therefore not a defence that warrants rejection outright. It ought to have been considered by the learned sessions court judge. He ought to have applied his mind to the defence advanced and consider whether it had raised a reasonable doubt in the case for the prosecution even though it could not be accepted or believed. Since he failed to consider the defence, this court is duty bound to review it. In my opinion it would be difficult to ignore the evidence of DW2 and DW3 for various reasons. They were witnesses who had been offered to the defence by the prosecution. It can be safely presumed that their evidence is consistent with statements that they would have given to the ACA. Their evidence cannot thus be said to be a recent invention. If the defence was indeed a fix-up, DW2 would have been emphatic in saying, as DW3 did, that the accused did not open the drawer. He did not say that. This indicates that he is truthful. The defence assumes greater significance in view of the evidence relating to the manner in which the trap money was recovered. When PW11 searched the accused, the other ACA officers with him were Kasim Osman, Yusof, PW6 and PW12. PW11 did not find anything on the person of the accused. As he said:

> Saya dan En Yusof keluar dari pejabat OKT. Saya maklumkan wang tidak ada pada OKT dan apa tindakan seterusnya. Kami memutuskan buat pemeriksaan sepenuhnya dalam bilik.

While the decision to conduct a full search was being made outside the office of the accused, the ACA officers left with the accused would have been Kasim Osman, PW6 and PW12. On the other hand, the sequence of events as narrated by PW9 is different. He said that initially only three persons went into the office of the accused. They were PW6, PW11 and he himself. As to what happened thereafter he said:

> Saya masuk dalam bilik ketika itu tertuduh ada di mejanya sedang membuat kerja. Penolong Penguasa Abd Rahman Bakar memperkenalkan diri sebagai pegawai BPR dan menangkap tertuduh.
>
> Ketika itu juga Penguasa Mat Jusoh dan Penguasa Kasim masuk ke balai. Saya terima arahan dari Penguasa Kasim untuk menggeledah meja yang tertuduh duduk. Dalam laci di sebelah kiri laci nombor 2 saya jumpa surat jamin polis bersama wang RM200.

The manner and timing of the recovery of the trap money as testified by PW9 and PW11 is contradictory. PW11 did not identify PW9 as one of the persons who followed him into the office of the accused. Yet PW9 appears from nowhere and opens the drawer. According to him, he was instructed to search the drawer soon after the arrest of the accused while PW11 gave a different version of this. These inconsistencies were not explained by the prosecution in the course of its case. The result is that there is considerable doubt in the prosecution's evidence relating to the recovery of the trap money. Be that as it may, a matter that is required to be addressed is the failure by the defence to suggest the defence advanced to the prosecution in the course of its case, in particular, to PW9 who said that he had opened the drawer from where the trap money was recovered. If that had been done, the prosecution would have had the opportunity to test the veracity of the defence advanced. PW9 would have been able to say whether the drawer made any noise when he opened it. Such evidence would have had a decisive effect on this part of the defence evidence. It is settled law that a party must put its case to the opposing side by way of cross-examination so that an explanation may be offered for it (see *Browne v Dunn* (1893) 6 R 67). But failure to do so is not fatal. As Edgar Joseph Jr SCJ said in *Alcontara all Ambross Anthony v Public Prosecutor* [1996] 1 MLJ 209 at p 218:

> ... it is settled law that, although a court may view with suspicion a defence which has not been put to the appropriate prosecution witnesses who might have personal knowledge of the points at issue, the court is still bound to consider the defence, however weak, and to acquit if not satisfied that the prosecution has discharged the burden of proof which rests upon it.

The defence advanced cannot therefore be dismissed outright. It must still be considered. This is because the prosecution carries the burden of proof right till the end of the case. A defence raised, even though not put to the appropriate prosecution witnesses, may still be capable of raising a reasonable doubt by virtue of its strength. It is the responsibility of the prosecution to negate any doubt that has been raised by the defence. The prosecution may do this in the course of its case if the doubt had been raised at that stage, or, if raised at the defence stage, by splitting its case by calling evidence in rebuttal. However, the circumstances in which the prosecution may call evidence in rebuttal are limited. One instance when it may do so is to challenge a defence that has been mounted for the first time in the course of the defence case without it having been suggested in the course of its case. In *Public Prosecutor v Chia Leong Foo* [2000] 6 MLJ 705, I referred to the Australian case of *R v Killick* (1980) 24 SASR 137 where Wells J in dealing with the instances when a party can call evidence in rebuttal said, inter alia, at p 153:

> Another kind of case where rebuttal evidence is likely to be appropriate, and which is encountered far too often in practice, is to be found where one side has failed to comply with the rule of practice and common fairness usually identified by the description 'the rule in *Browne v Dunn* (1893) 6 R 67 (HL)'. In such a case, it will emerge that one side has failed to put part of its case to a witness, called by the other side, who is concerned with that part, and has then led evidence from its own witness or witnesses as to the matters not put.

> When this occurs, the party whose witness has been thus wronged usually has the clear right to recall that witness in order to enable him to deal specifically with the matters not previously put to him.

The prosecution ought to have recalled PW9 on this issue when the defence closed its case as it is entitled to do so. The members of the public who were with the accused at the time of his arrest could have also been called to rebut this defence. This was not done. The failure by the prosecution to call evidence to rebut the defence raised lends additional credit to it. The significance of the evidence of DW2 and DW3 is thus discernible. It is capable of creating a doubt as to whether the trap money was given to the accused. An explanation offered by an accused which is consistent with his innocence must be accepted by the court even though not convinced of its truth (see *Chan Thim v Public Prosecutor* [1949] MLJ 72). In the circumstances, it is my view that the defence advanced cannot be rejected even though it may not be believable. It has been held that where there is no adequate or proper evidence rebutting an accused's testimony, a conviction thereon cannot be supported (see *Yeoh Bah Kow v Public Prosecutor* [1961] MLJ 6). The failure by the learned sessions court judge to have considered the defence is therefore a non-direction which has resulted in a grave miscarriage of justice.

I shall now deal with the defence objections in connection with the statement made from the dock by the accused. The first objection is that learned counsel was precluded from assisting the accused in making the statement. It must be observed that this is one of the three options that an accused has when he is called upon to enter his defence. As I said in *Noliana bte Sulaiman v Public Prosecutor* [2000] 4 MLJ 752, it falls within the meaning of 'evidence' as it is a matter that the court must consider in arriving at its decision. It is therefore a very significant part of the case for the defence. A statement from the dock is an alternative to a written statement that an accused may put in as authorized by s 173(k) of the Criminal Procedure Code. There is no prohibition in such a written statement being prepared by counsel with the result that counsel may do so. In commenting on counsel's assistance in preparing such a statement, *Sarkar on Criminal Procedure* (7th Ed) says at p 950:

> It cannot be laid down as a general rule that the written statement filed by an accused should not receive the attention of the court on the ground that it is likely to have been influenced by legal advice. Such distrust of legal advice would be entirely unjustified.

If a written statement can be prepared with the assistance of counsel, I see no reason why a similar oral statement should be deprived of that advantage. The right to legal representation has been expressly conferred by art 5(3) of the Federal Constitution which provides that a person who has been arrested shall be allowed to consult and be defended by a legal practitioner of his choice. This is reinforced by s 255 of the Criminal Procedure Code which reads as follows:

> Subject to the provisions of s 8, and to any express provision of law to the contrary, every person accused before any Criminal Court may of right be defended by an advocate.

Such a fundamental right cannot be whittled down or restricted unless there is express statutory provision to that effect of which there is none in the case of the manner of making a statement from the dock. The right to be defended means that not only must counsel be heard but that there must also be an opportunity of being effectively heard (see *Vinayak Laxman v Emperor* AIR 1928 Bom 557). The right will be meaningless if the legal representative is precluded from full participation. Counsel can be fully and effectively heard only if he has complete control of the defence. This must include the right to adduce evidence which is relevant, necessary and admissible when the accused is required to testify. It is absolutely necessary for counsel to have such a right as he is the person who is ultimately responsible for the conduct of the defence. As such, he cannot be denied the right to participate fully in the proceedings in any manner chosen by the accused to advance his defence. After all, the object of having counsel in a proceeding to represent a party is to ensure that his case is articulated in the best possible method having due regard to the facts and the law of the case. As counsel is entitled to make a final address even where the accused makes a statement from the dock (see *Lee Kong Yin v Public Prosecutor* [1970] 2 MLJ 205). I fail to see how he can make such an address effectively and with conviction in respect of the advancement of a defence over which he had no control. Furthermore, a statement from the dock made without the benefit of counsel who is present may result in it being incomplete and irrelevant with total disregard of the issues that must be addressed. In this regard, I consider it pertinent to refer to *Pett v Greyhound Racing Association Ltd* [1969] 1 QB 125 where Lord Denning MR said at p 132:

> It is not every man who has the ability to defend himself on his own. He cannot bring out the points in his own favour or the weaknesses in the other side. He may be tongue-tied or nervous, confused or wanting in intelligence. He cannot examine or cross-examine witnesses. We see it every day ... If justice is to be done, he ought to have the help of someone to speak for him. And who better than a lawyer who has been trained for the task. I should have thought, therefore, that when a man's reputation or livelihood is at stake, he not only has a right to speak by his own mouth. He also has the right to speak by counsel or solicitor.

Such a predicament will have an impact on a person's right to be heard. It is indisputable that the right to be heard would be rendered of little value in many instances if it did not also comprehend the right to be heard by counsel (see *Natural Justice* by Geoffrey Flick (2nd Ed) at p 788). Thus, a denial of the right to make a proper statement from the dock with the assistance of counsel will result in the accused being not heard properly and thereby amount to a breach of natural justice unless there is statutory power to do so of which there is none. It is of fundamental importance that justice should not only be done but should manifestly and undoubtedly be seen to be done. Compelling a person to make a statement from the dock unaided will be a violation of this rule. In the circumstances, I do not see any reason why counsel should be precluded from assisting his client in making a statement from the dock. The second objection is that the learned sessions court judge refused to allow the accused's application to give sworn

A evidence after he had completed making his statement from the dock. In my opinion, the application ought to have been allowed. At the time of making the application, no other defence witnesses had been called yet. Thus, the application made by the accused will not in any way conflict with s 173(j)(iii) of the Criminal Procedure Code which provides that the evidence of the accused shall be taken before that of other witnesses for the B defence. The application made by the accused, though of undoubted inconvenience to the court, is consistent with the rule that every possible opportunity should be afforded to an accused to defend himself. The result of these breaches is that the accused has been denied the right of advancing his defence in the best possible way which amounts to a miscarriage of C justice.

If the miscarriage of justice in this case had been confined to the objections relating to the statement from the dock made by the accused, I would have ordered a retrial. However, that was not so. In the upshot, I allowed the appeal and acquitted and discharged the accused.

D *Appeal allowed.*

Reported by Peter Ling

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